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(26)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 182

O'BRYAN BROTHERS, PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

SUBJECT INDEX

Petition for Writ of Certiorari 1

Summary Statement of the Matter Involved 1
Reasons Relied Upon for the Issuance of the Writ 4
Prayer for Writ 5

Brief in Support of Petition for Certiorari 7

I. Jurisdiction 7
II. Statement of the Case 8
III. Specification of Error 8
IV. Argument 9

Conclusion 14

TABLE OF CASES

City Builders Finance Co., 21 B. T. A. 800 13
Commissioner of Internal Revenue vs. Burdick, 59 F. 2d 395 ..... 5, 10
Commissioner of Internal Revenue vs. Wright, 47 F. 2d 871 ..... 5, 9, 11
Deeds vs. Commissioner of Internal Revenue, 47 F. 2d 695 ..... 5, 11
Robert Gaylord, Inc., 41 B. T. A. 1119 13

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May It Please the Court:

The petitioner, O'Bryan Brothers, a corporation, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, O'Bryan Brothers, a corporation engaged in the manufacture of work clothing in Nashville, Tennessee, filed its petition against the Commissioner of Internal Revenue in the United States Circuit Court of Appeals for the Sixth Circuit (No. 8950) seeking to have

that court review and set aside a deficiency assessment found by the Board of Tax Appeals to be due in the income tax and excess profits tax of petitioner for the calendar year 1933 in the respective amounts of $10,476.35 and $684.58.

There was no dispute with respect to essential facts as the evidence before the Board of Tax Appeals consisted entirely of the testimony of T. P. Kennedy, Jr., President of petitioner corporation, and the exhibits. These undisputed facts may be summarized as follows:

Petitioner had heavy losses in 1930 and 1931, and towards the end of 1931 it owed the American National Bank of Nashville, Tennessee, the sum of $145,000. The bank caused an audit to be made, which disclosed that T. P. Kennedy, Sr., individually owed three accounts to the corporation which had been running many years, aggregating approximately $208,000 as of December 31, 1930. The bank demanded that T. P. Kennedy, Sr., execute his note for the amount of his indebtedness to the corporation and secure the same by pledging all of his holdings in petitioner's common stock (1,308 shares out of a total of 1,500 shares outstanding) to the corporation as collateral, and by executing a deed of trust on his residence. This was done and Kennedy's note and collateral securing the same were transmitted by the corporation to the bank as security for the corporation's indebtedness to the bank (R. 61-65).

During the early part of 1932 the corporation continued to suffer heavy losses and T. P. Kennedy, Sr., who was then President, became highly nervous and remained at home and was not able to get out. The American National Bank, as the largest creditor, then took charge of the corporation's business and operated it under the supervision of George J. Hearn, a Vice President of the bank, and his assistant, J. C. Schutt. T. P. Kennedy, Sr., was removed from supervision over the affairs of the corporation and placed on the road as a salesman at a greatly reduced salary, and the entire direction of the business was in the bank (R. 65-66).

In order to keep the company operating in 1932 the bank subordinated its entire indebtedness and guaranteed the corporation's commercial accounts. A further loss was incurred for the calendar year 1932.

After T. P. Kennedy, Sr., was removed from office, his son, a young man thirty years of age who owned no common stock in the corporation, was made nominal President of the corporation. Shortly thereafter, in the spring of 1933, President Roosevelt closed all of the banks as a result of the severe business depression (R. 66).

In June, 1933, the American National Bank was unwilling to continue its financial support of the corporation unless T. P. Kennedy, Jr., would agree to a permanent connection with the corporation and then only provided his position was made secure and permanent by a transfer to him of fifty-one percent of the common stock, representing control, out of the collateral which T. P. Kennedy, Sr., had pledged to secure his indebtedness. The corporation was fighting desperately to keep itself afloat, and it had no choice except to comply with the bank's demand. The alternative was bankruptcy and dissolution. Under this economic compulsion, the corporation released 751 shares of the common stock which it held as collateral and T. P. Kennedy, Sr., was required to transfer it to his son, who thereupon assumed the permanent control of the corporation's affairs (R. 68).

T. P. Kennedy, Sr., individually was insolvent. He owed a total of $238,000, and he had no other assets except those pledged to secure his indebtedness to the corporation. He was at an advanced age of life, had lost control of the corporation, was in bad health and had been reduced to the position of salesman at a small salary. The interest on his indebtedness to the corporation was more than $1,000 per month, and this interest alone was more than three times his salary (R. 65, 69, 70, 71).

The petitioner's indebtedness against T. P. Kennedy, Sr., under these circumstances, had no value other than the value of the collateral. The highest ap-

praised value of the homeplace was $35,000. The proof shows that the common stock, at the time of the surrender, had an actual value of between $65 and $70 a share. The 557 shares of common stock which remained pledged to secure the indebtedness, at this valuation, were worth approximately $70,000, so that the total remaining collateral was worth approximately $105,000. The corporation therefore valued its collateral at this amount and deducted the value from the indebtedness and charged off the difference, which was a loss of approximately $138,000 (R. 69-70).

The Board of Tax Appeals disallowed the deduction upon the ground that petitioner *voluntarily* relinquished the collateral consisting of 751 shares of its common stock. It also found that the value of the common stock was $150 per share.

The Circuit Court of Appeals affirmed the decision. It held in substance that the valuation of $150 per share placed on the stock by the Board of Tax Appeals was supported by substantial evidence and that petitioner *voluntarily* surrendered collateral which otherwise would have made its debt good, and the resulting loss occurred by reason of this *voluntary* act on the part of petitioner.

The Circuit Court of Appeals disregarded and made no mention of the *undisputed evidence* which showed that petitioner released the collateral upon the demand of the bank, under the threat of bankruptcy and dissolution, which amounted to economic compulsion and rendered the release involuntary, as the only alternative was dissolution and the consequent loss of the entire debt.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case, in holding that the surrender of stock under economic compulsion was a volun-

tary act, is directly in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Wright,* 47 F. 2d 871, and is also in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner of Internal Revenue* v. *Burdick,* 59 F. 2d 395. It also conflicts with the previous decision of the Circuit Court of Appeals for the Sixth Circuit in *Deeds* v. *Commissioner of Internal Revenue,* 47 F. 2d 695.

2. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case involves an important question of Federal law which has not been, but should be, settled by this Court.

Your petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the entire record in this cause in the Circuit Court of Appeals for the Sixth Circuit, specification of error, and brief and argument, giving in more amplified form the reasons why the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was erroneous and should be reversed, and respectfully asks that the certified copy of the record, specification of error, brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Circuit Court of Appeals for the Sixth Circuit.

PRAYER FOR WRIT.

Wherefore your petitioner, O'Bryan Brothers, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case cited on its docket

as No. 8950, styled O'Bryan Brothers, Petitioner, v. Commissioner of Internal Revenue, Respondent, and that said judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Honorable Court may deem meet and just; and your petitioner will ever pray.

O'BRYAN BROTHERS,
By CECIL SIMS,
Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.